Nos. 21,621, 21,632 and 21,649

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

No. 21,621

GALLENKAMP STORES CO.; MERCURY DISTRIBUTING COMPANY; ACME QUALITY PAINTS; and F & G MERCHANDISING;

Petitioners,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

No. 21,632

K-MART, a Division of S. S. KRESGE COMPANY,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

No. 21,649

HOLLYWOOD HAT CO.,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

Brief of Petitioners Gallenkamp Stores Co., Mercury Distributing Company, Acme Quality Paints and F & G Merchandising in Support of Joint and Several Petition to Review and Set Aside an Order of the National Labor Relations Board.

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I.
JURISDICTIONAL STATEMENT.

This case is before this Court by way of three petitions filed respectively by GallenKamp Stores Co., Mercury Distributing Company, Acme Quality Paints, and F. & G. Merchandising (Docket No. 21,621) [hereinafter sometimes referred to collectively as "Licensee Petitioners"], K-Mart, a Division of S. S. Kresge Company (Docket No. 21,632) [hereinafter sometimes referred to as "K-Mart"], and Hollywood Hat Co. (Docket No. 21,649) [all said parties hereinafter sometimes referred to collectively as the "Petitioners"] to review and set aside a final Order of the National Labor Relations Board [hereinafter referred to as the "Board" or the "Respondent"] issued on December 30, 1966 in a case known on the records of the Board as "K-MART, A DIVISION OF S. S. KRESGE COMPANY; GALLENKAMP STORES CO.; MERCURY DISTRIBUTING COMPANY; ACME QUALITY PAINTS; F & G MERCHANDISING; HOLLYWOOD HAT CO.; and BESCO ENTERPRISES, INC. and RETAIL CLERKS UNION LOCAL NO. 770, RETAIL CLERKS INTERNATIONAL ASSOCIATION, AFL-CIO, CASE NO. 21-CA-6937." The proceedings are also before this Court by virtue of the Cross-Petition for Enforcement of said Order filed by the Board as to each of the said petitions. Retail Clerks Union Local No. 770, Retail Clerks International Association, AFL-CIO [hereinafter referred to as the "Union"], charging party below, on motion granted by the Court has intervened in these proceedings.

All Petitioners herein are engaged in business within the Ninth Judicial Circuit and the unfair labor practices alleged in the complaint upon which said final Order of the Board was entered allegedly occurred within this judicial circuit. As the Petitioners are aggrieved by said final Order of the Respondent and Cross-Petitioner herein, this Court has jurisdiction under Section 10(f) of the National Labor Relations Act, as amended [61 Stat. 136 *et seq.* (1947), 29 U.S.C. §141 *et seq.* (1958)].

II.
STATEMENT OF FACTS.

1. K-Mart and Its Licensees.

The uncontradicted record evidence adduced at the hearing before the Board in the underlying representation case herein, case No. 21-RC-9309, established that K-Mart does not have the right to, and does not, exercise control over the wages, hours or working conditions of Licensee Petitioners' employees or the employees of the other licensees operating at K-Mart's Commerce store. Moreover, there is not a scintilla of evidence establishing joint control of labor relations by K-Mart and the licensees operating at the Commerce store.

Thus, Licensee Petitioners herein, and the other licensees doing business at the Commerce store, hire and discharge their own employees without the intervention or control of K-Mart (Vol. II(a), p. 46, lines 9-16). Indeed, K-Mart supervisors have no supervisory authority over the employees of the licensees (Vol. II(a), p. 45, lines 19-25). Each of the licensees employs, in addition to its departmental supervisors,

one or more supervisors referred to as "roving supervisors" who spend all or a considerable amount of their time managing and supervising the licensee's operations in the K-Mart Commerce store, other K-Mart stores, and indeed, in stores having no connection or relationship whatsoever with K-Mart (Vol. II(a), p. 56, line 21, to p. 58, line 13; p. 65, lines 1-25; p. 208, line 1, to p. 209, line 20; p. 300, lines 1-26). The licensees establish the wage rates for their own employees (Vol. II(a), p. 47, lines 11-13), and significantly, K-Mart is not even supplied with information concerning the wages paid by the licensees to their employees (Vol. II(a), p. 55, line 25, to p. 56, line 2). The licensees determine the work schedules for their employees (Vol. II(a), p. 47, lines 14-16; p. 53, lines 19-25). Employees of licensees do not receive the same fringe benefits provided by K-Mart to its employees (Vol. II(a), p. 51, line 24, to p. 53, line 25). Equally important, there is no interchange between employees of the licensees and K-Mart employees and neither performs the work of the other (Vol. II(a), p. 49, line 22, to p. 50, line 2). Furthermore, a number of the employees of the Licensee Petitioners herein are employed on frequent occasions by said licensees at locations other than the K-Mart Commerce store and, indeed, at locations totally independent of K-Mart (Vol. II(a), p. 50, line 3, to p. 51, line 16). With respect to the license agreements between K-Mart and the licensees, it is important to note that said license agreements negate the creation of any joint venture or partnership relationship. More importantly, the license agreements do not provide for the common handling of labor relations for the licensees' employees, and

nothing contained therein suggests that the parties contemplated such joint control or evidences any such intent (Vol. II(a), p. 71; Vol. III, Employer Ex. 1, Case No. 21-RC-9309).

There is no record evidence that K-Mart exercises control over the licensees' employees so as to affect their working conditions or tenure of employment. Nor is there any evidence that K-Mart has ever had any part in settling grievances of licensees' employees. The fact of the matter is, such limited control as K-Mart may exercise over the licensees' operations is only that necessary for efficient operation of the stores and to give the appearance to the public of an integrated retail operation. Indeed, the evidence is so conclusive that the licensees exclusively operate their own departments that it is no wonder that the Union willingly joined in a stipulation with Petitioners that "none of these concessions are owned or operated by K-Mart" (Vol. II(a), p. 89, lines 5-14).

2. F & G Merchandising.

F & G Merchandising [hereinafter sometimes referred to as "F & G"] is a licensee operating an automotive service center which, unlike the other licensee departments, is located in a room separate and apart from the rest of K-Mart's Commerce store (Vol. II (a), p. 58, line 14, to p. 60, line 20).

F & G employs approximately five or six employees at the K-Mart Commerce store, most of whom are experienced, trained mechanics. These mechanics perform automotive work, such as front end work, wheel balancing, brake work, safety checks, fixing flat tires, replacing mufflers, and installing automobile acces-

sories (Vol. II(a), p. 58, line 14, to p. 59, line 18; p. 60, lines 5-18; p. 68, lines 10-16).

As is the case with the other licensees at K-Mart's Commerce store, F & G determines all matters with respect to wages, hours and working conditions for its automotive service center employees, without the intervention or control of K-Mart (Vol. II(a), p. 67, line 20, to p. 68, line 6). F & G hires and fires its own employees (Vol. II(a), p. 68, lines 7-9), and it determines the work schedules of its employees who often work different hours than those worked by other store employees (Vol. II(a), p. 60, line 24, to p. 61, line 7). F & G employees are not supervised by K-Mart supervisors, and there is no interchange between F & G's employees and K-Mart's employees (Vol. II(a), p. 49, line 22, to p. 50, line 2; p. 60, lines 2-4). In addition, its mechanics wear different uniforms than other store employees and have different restroom facilities from all other employees at the K-Mart store (Vol. II(a), p. 60, line 21, to p. 61, line 9).

There are other substantial factors distinguishing F & G operations from those of K-Mart and/or the other licensees doing business at the K-Mart Commerce store. Thus, F & G purchases its own merchandise, and any complaints concerning its services are made directly at its automotive service center (Vol. II(a), p. 59, line 24, to p. 60, line 1; p. 197, line 25, to p. 198, line 1). Unlike the rest of the store operations, services performed by F & G are paid for at the automotive center, and F & G maintains a separate office at the K-Mart Commerce store, apart from those offices maintained by K-Mart and the other licensees (Vol. II(a), p. 59, lines 19-23; p. 61, lines

10-22). Also unlike other licensees, F & G does not participate in joint advertising but conducts its own advertising without any control by K-Mart (Vol. II (a), p. 195, lines 2-13).

Significantly, the mechanics and others working on automobiles in the F & G department are experienced and skilled in the area of automobile maintenance, and are not merely unskilled sales personnel as are found in the other departments at the K-Mart Commerce store (Vol. II(a), p. 298, lines 11-25). As a consequence, one would expect, and the fact of the matter is, that the employees of F & G receive remuneration different from that received by the employees of the other licensees and K-Mart, the employees of F & G receiving commissions or bonuses not enjoyed by said other employees (Vol. II(a), p. 61, line 23, to p. 62, line 17).

3. The Challenged Ballot Cast by Employee Pentecost.

In the election held at the Commerce store on April 7, 1965 the vote cast by employee Pentecost, an employee of F & G Merchandising, was challenged by the Union on the alleged ground that Pentecost was a supervisor.[1]

With respect to this matter, Mr. Richard Wall, Manager of the F & G department at K-Mart's store in

[1]The Union's challenge to Pentecost's ballot was based only upon the alleged ground that he was a supervisor within the meaning of the Act, as amended (Vol. III, G. C. Ex. 12). F & G denied that Pentecost was a supervisor and a statement in support of this position was submitted to the 21st Region of the Board by letter dated May 3, 1965 (Vol. III, G. C. Ex. 22). Apparently, the Regional Director regarded the Union's contention in this regard as being wholly without merit, since the matter is not even discussed in the Regional Director's Supplemental Decision and Direction (Vol. III, G. C. Ex. 28(a)).

Commerce and Pentecost's supervisor at the time of the election, would have testified as to the following facts:[2]

Pentecost was hired by F & G on or about February 1, 1965. Prior thereto, on or about January 6, Wall was hired to become the manager of F & G's department at the Commerce store, a position which was to become open in the near future. Pending such opening, Wall was classified as a Manager-Trainee, and was trained by the manager of the F & G department at K-Mart's Costa Mesa store. It was also understood that Wall would be sent to F & G's main offices in Houston, Texas for a training period prior to taking over as manager of the Commerce store (Vol. III, G. C. Ex. 31, Ex. "A", p. 1).

With respect to Pentecost, Wall's affidavit states:

> "I knew Pentecost before starting to work at Commerce because I had worked with him at Scoa in Los Angeles for about a year in 1963. I liked Pentecost's work as a mechanic. After I was hired by F & G, I contacted Pentecost toward the end of January. I told him I was going to be manager in the Commerce store and I wanted him to work for me. He agreed. I told Pentecost it would be a couple of weeks before I would be taking over the Commerce store. I thought it would be a good idea for Pentecost to learn some of the procedures prior to coming into the Commerce store. I spoke to Bill Boyce [manager of the Costa Mesa store]

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[2]Wall would have testified at the trial herein, had he been permitted to do so, in accordance with his affidavit attached as Exhibit "A" to General Counsel's Exhibit 31 (Vol. II, p. 40, line 11, to p. 41, line 13). The Trial Examiner, however, improperly refused to permit his testimony (Vol. II, p. 37, line 19, to p. 40, line 5).

> and I suggested that we train Dick [Pentecost] in Costa Mesa along with me so that he might familiarize himself with Company policies. Boyce agreed to put him on. I contacted Pentecost and told him of the arrangement. I told him that while I was gone to Texas he would be training in the Costa Mesa store under Bill Boyce's mechanic. I told him that when I got back, he would come into the Commerce store with me. I told him I believed I would be gone about two weeks. I was in fact gone ten days. Pentecost agreed to this arrangement only on my assurance that this was temporary pending my return from Texas." (Vol. III, G. C. Ex. 31, Ex. "A", pp. 2-3).[3]

Wall went to Houston for his training period on February 7. He returned from Houston on February 17 and took over management of the Commerce store on February 18. Pentecost's last day of work at Costa Mesa was February 17, his regular day off was February 18, and he reported at the Commerce store on February 19. Pentecost worked at Commerce at all times thereafter to and including April 7, the date of the election herein (Vol. III, G. C. Ex. 31, Ex. "A", pp. 1, 3).

The wages paid to Pentecost during his training period at Costa Mesa from February 1 through Feb-

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[3]The statement in the Regional Director's Supplemental Decision and Direction (G. C. Ex. 28(a)) that Pentecost was hired "by the F & G manager at the K-Mart Costa Mesa store" is contrary to the facts set forth in Wall's affidavit. The above-quoted statements from said affidavit clearly disclose that it was Wall, and not the manager at Costa Mesa, who hired Pentecost. The manager of the Costa Mesa store merely agreed to Wall's suggestion that Pentecost be trained at Cosa Mesa.

ruary 17 were charged to the Commerce store.[4] Wall was informed that this would be the case by the manager of the Costa Mesa store (Vol. III, G. C. Ex. 31, Ex. "A", pp. 3-4). This fact is further evidenced by F & G's general journal entry which states "To transfer wages of W. R. Pentecost earned in 1st quarter. He was only training at #43 [Costa Mesa] for position at #64 [Commerce]." (Vol. III, G. C. Ex. 27; Vol. III, G. C. Ex. 31, Ex. B).

The procedures adopted in Pentecost's case were completely in accordance with F & G's standard procedures since it is common practice for new employees to be trained at locations other than the ones for which they are hired, and, in all such cases, the salary paid during the training period is charged to the location for which the new employee is hired. Indeed, the exact same procedure was followed in Wall's case since his salary during the entire period prior to his taking over as manager on February 18 was charged to the Commerce store (Vol. III, G. C. Ex. 31, Ex. "A").

The foregoing is the only record evidence herein concerning the facts relevant to a determination of the challenge to Pentecost's vote.

The original Decision and Direction of Elections herein (Vol. III, G. C. Ex. 5(a)) provided:

> "Eligible to vote are those in the units who were employed during the payroll period immediately preceding the date below. . . ." (*Id.* at p. 8).

The "date below" was the date of issuance of the Decision, February 24, 1965. The payroll period imme-

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[4]The Supplemental Decision and Direction (G. C. Ex. 28(a)) refers apparently inadvertently to Wall's wages at Costa Mesa, rather than Pentecost's, being charged to Commerce.

diately preceding February 24 was in fact the payroll period ending February 24, during which payroll period Pentecost was concededly both on the payroll and physically present performing his duties at the Commerce store.

Despite the foregoing, however, in his Supplemental Decision and Direction (Vol. III, G. C. Ex. 28(a)), the Regional Director mistakenly and erroneously designated the payroll period ending February 17 as the appropriate payroll period. (*Id.* at p. 3).

Then following the election—and to further compound error—the Regional Director sustained the Union's challenge to Pentecost's ballot, thereby resulting in Pentecost's disenfranchisement and an election victory for the Union by a margin of only one vote—38 to 37! Had the Regional Director properly overruled the Union's challenge to Pentecost's ballot as the facts and law required, the election could have resulted in a tie vote—38 to 38—in which case, of course, the Union would have lost the election.

In addition to the foregoing facts, Licensee Petitioners hereby join in, adopt and incorporate by reference the statement of facts contained in the Brief filed by K-Mart herein.

III.
SPECIFICATION OF ERROR.

The Licensee Petitioners specify herein only those errors which are the subject matter of the argument hereinafter presented. Those errors are as follows:

1. The Respondent's conclusion and holding that Licensee Petitioners herein and K-Mart are common or "joint" employers is clearly erroneous in that it is not

supported by substantial evidence on the record considered as a whole and is contrary to law.

2. The Respondent's conclusion and holding that the employees of Petitioner F & G were included in an overall unit is clearly erroneous in that it is not supported by substantial evidence on the record considered as a whole and is contrary to law.

3. The Respondent's conclusion and holding that F & G employee Pentecost was ineligible to vote in the election herein is clearly erroneous in that it is not supported by substantial evidence on the record considered as a whole and is contrary to law.

In addition to the foregoing specifications of error, Licensee Petitioners also rely upon the remaining errors alleged in their "Points Upon Which Petitioners Rely" on file herein, and with respect thereto, Licensee Petitioners hereby join in, adopt and incorporate by reference the arguments contained in the Brief filed by K-Mart herein.

IV.
QUESTIONS PRESENTED.

The questions presented by the specifications of error herein are:

1. Whether the Petitioners are common or "joint" employers of each other's employees;

2. Whether an overall unit at the K-Mart store herein is inappropriate because, among other reasons, F & G employees present a homogenous, identifiable and distinct group and lack a sufficient community of interest with other employees to warrant their inclusion in said unit; and

3. Whether the challenge to the ballot of employee Pentecost was improperly sustained, said ballot being sufficient to affect the results of the election herein.

V.
SUMMARY OF ARGUMENT.

A. The Board's Conclusion and Holding That Petitioners Herein Are Common or Joint Employers Is Not Supported by Substantial Evidence on the Record Considered as a Whole and Is Contrary to Law.

The uncontradicted record evidence herein demonstrates that in the day-to-day operations of the K-Mart store K-Mart does not control the conditions of employment relating to the employees of the licensees or the labor relations policies of the licensees. Equally important, neither the license agreement nor the rules and regulations promulgated by K-Mart permit K-Mart to interfere with or exercise control over the labor relations policies applied by the licensees to their employees. Indeed, the license agreements by their express terms, and the conduct of K-Mart and its licensees under their license agreements negates the conclusion reached by the Board herein. At the time of the Regional Director's original Decision and Direction of Elections herein, then current Board authority required a finding that K-Mart and its licensees were not joint employers. Thus, the Regional Director's conclusion and holding to the contrary, which the Board summarily adopted, is not supported by substantial evidence on the record considered as a whole and is contrary to law.

A review of Board precedent dealing with the issue of appropriate units in the retail and discount indus-

try demonstrates that its decision herein is based upon factors that are contrary to the purposes, policies and provisions of the Act. Moreover, the Decision and Order herein will operate to the prejudice of the licensees doing business in K-Mart's Commerce store and will not produce sound, stable collective bargaining relationships.

B. An Overall Unit at K-Mart's Commerce Store Is Inappropriate Because, Among Other Reasons, F & G Employees Represent a Homogenous, Identifiable and Distinct Group and Lack a Sufficient Community of Interest With Other Employees to Warrant Their Inclusion.

The uncontradicted record evidence herein establishes that the employees of F & G represent a homogenous, identifiable and distinct group which lacks a sufficient community of interest with the other employees herein to warrant their inclusion in the overall unit found appropriate by the Board. The Board's conclusion to the contrary is supported neither by fact nor law. Accordingly, as an overall unit is clearly not appropriate —and this is the unit in which the refusal to bargain is alleged to have occurred—none of the Petitioners can be found to have violated Section 8(a)(5) of the Act, as alleged.

C. The Board Improperly Sustained the Union's Challenge to the Ballot of Employee Pentecost, Said Ballot Being Sufficient to Affect the Results of the Election Herein.

Employee Pentecost was concededly both on the payroll and physically present performing his duty at the Commerce store a full five days before February 24, 1965, the eligibility cut off date established in the orig-

inal Decision and Direction of Elections herein. For this reason alone, Pentecost's vote should have been counted.

Despite the foregoing, however, in his Supplemental Decision and Direction herein, the Regional Director mistakenly and erroneously designated the payroll period ending February 17 as the appropriate payroll period. Nevertheless, it is uncontradicted that Pentecost (1) was hired by F & G for employment in the Commerce store two and one-half weeks prior to February 17—the revised eligibility date; (2) his assignment to the Costa Mesa store was temporary and for training purposes only; and (3) his salary while in training at Costa Mesa was charged to the Commerce store. Therefore, under well-established Board authority, Pentecost was clearly eligible to vote in the election herein. Since the Union won the election by a margin of only one vote, Pentecost's ballot was sufficient to affect the result of the election herein. Accordingly, since there can be no violation of Section 8(a)(5) of the Act in a case where the Board has improperly sustained challenges to ballots sufficient in number to affect the results of the election, there was no violation in this case.

VI.
ARGUMENT.

A. The Respondent's Conclusion and Holding That Petitioners Herein Are Common or "Joint" Employers Is Not Supported by Substantial Evidence on the Record Considered as a Whole and Is Contrary to Law.

1. The Regional Director's Decision and Direction of Elections Herein Is Contrary to Fact and Law.

Of controlling significance is the fact that the uncontradicted record evidence herein demonstrates that in the day-to-day operations of K-Mart's store, K-Mart does not control the conditions of employment relating to the employees of the licensees or the labor relations policies of the licensees. Yet, the Regional Director in his original Decision and Direction of Elections (Vol. III, G. C. Ex. 5(a)) chose to ignore completely this record evidence and, without analysis, concluded that K-Mart and each of its licensees were common or joint employers of the employees in each of the respective licensee departments. Rather than considering the comprehensive record evidence before him the Regional Director based his decision upon (1) his prior decision in 1963 in case No. 21-RC-8194 (unreported) involving K-Mart operations, and (2) his erroneous interpretation of the license agreements between K-Mart and its licensees.

Reliance upon the prior decision in 1963 was completely misplaced for several reasons. First, there was no showing at the hearing held in the instant case in January 1965 that the conditions then existing at K-Mart's Commerce store involving all of the licenses

were identical to the conditions existing approximately two years earlier at the time of the prior decision which concerned both K-Mart's Commerce and San Fernando stores and only certain of the licensees herein.[5] Second, the Regional Director relied upon a line of authority, which had served as the basis for his prior decision, which no longer represented viable Board precedent at the time of the instant decision. Thus, the Regional Director's decisions in both the prior and instant cases were based upon *Spartan Department Stores,* 140 NLRB 608 (1963); and *Frostco Super Save Stores, Inc.,* 138 NLRB 125 (1962).[6] But clearly, at the time of his Decision and Direction of Elections herein, those decisions had been severely limited—indeed, overruled by implication—by then current Board authority. See, *e.g., S.A.G.E., Inc. of Houston,* 146 NLRB 325 (1964); *Bab-Rand Co.,* 147 NLRB 247 (1964); and *Esgro Anaheim, Inc.,* 150 NLRB 401 (1964).[7]

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[5]Indeed, the only record evidence in point indicates that the operations of the K-Mart store have changed substantially in the interim period (Vol. II(a), p. 194, lines 2-5).

[6]While *United Stores of America,* 138 NLRB 383 (1962) was cited in the Regional Director's prior decision in 1963, it was not cited in the original Decision and Direction of Elections herein.

[7]Whether the facts are viewed from the vantage point of 1963 or at the time of the Regional Director's original Decision and Direction of Elections herein, reliance on the decisions cited by the Regional Director was completely misplaced. The fact of the matter is that all licensors involved in the cases cited maintained substantial control over the conditions of employment and labor relations relating to the employees of their licensees. And, indeed, it was on that basis that the decisions in *Spartan, Frostco* and *United Stores* had been distinguished by Board authority then current at the time of the Regional Director's Decision and Direction of Elections herein. *Spartan Department Stores, Inc., supra,* is illustrative. There, the facts demonstrated that the licensor had authority to adjust any labor dispute involving a licensee department and could require licensees to comply with

Moreover, contrary to the Regional Director's conclusion, the license agreements between K-Mart and its licensees do not create a joint-employer relationship. Nor do the license agreements grant to K-Mart control over the conditions of employment and labor relations relating to the employees of its licensees. To the contrary, the license agreement itself negates any such conclusion. Thus, for example, each owner of a department in the K-Mart store is required to "pay all taxes levied on its . . . payrolls", and it is the responsibility of each owner/operator of a department to comply with all local, state and federal laws, such as workmen's compensation, occupational and non-occupational disability laws, and any other statutory requirements with respect to health and welfare benefits for its employees (Vol. III, G. C. Ex. 6, App. A, p. 3). The license agreement also expressly provides that "neither party to this Agreement shall act as the agent, servant or employer of the other party" and that "the parties do not intend this Agreement to constitute a joint venture, partnership or lease and nothing herein shall be construed to create such a relationship" (Vol. III, G. C. Ex. 6, App. "A", p. 8).

While the Regional Director apparently placed great emphasis upon the fact that the license agreement requires the licensees to comply with certain rules and

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terms of employment, hours, vacation policy, collective bargaining, and union affiliation as established by the licensor. Similarly, the facts in *United Stores of America,* and *Frostco, supra,* support a finding that the licensor controlled the working conditions or labor relations relating to the employees of its licensees.

regulations promulgated by K-Mart, he completely ignored the fact that the agreement permits *only* such rules and regulations which are "consistent with this License Agreement" and further only rules and regulations which are necessary and proper for the success and conduct of the business of the licensor and licensees at the K-Mart store (Vol. III, G. C. Ex. 6, App. A, pp. 1 and 4). The license agreement does not permit K-Mart to interfere with or exercise control over the labor relations policies applied by the licensees to their employees.[8]

Furthermore, and most important, the uncontradicted record evidence herein demonstrates that in day-to-day operations, K-Mart has not in fact interfered with or attempted to control the conditions of employment or labor relations relating to the employees of its licensees. In short, the conduct of K-Mart and its licensees *under* their license agreement negates the conclusion reached by the Regional Director herein.

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[8]Indeed, it is patently clear that under Board authority the license agreement and the rules and regulations promulgated by K-Mart do not constitute evidence from which an inference of a joint-employer relationship can be drawn. That fact is beyond controversy since a comparison of the license agreement and the rules and regulations herein with the license agreement and rules and regulations before the Board in its White Front Store decisions demonstrates that White Front exercised substantially greater control over its licensees than K-Mart does, and there the Board held that White Front and its licensees *were not* joint employers. See *Bab-Rand Co.*, 147 NLRB 247 (1964); *Esgro Anaheim, Inc.*, 150 NLRB 401 (1964); and *Triumph Sales Inc.*, 154 NLRB 916 (1965); Vol. III, G. C. Ex. 6, pp. 21, 22 (White Front License Agreement); and G. C. Ex. 6, App. "C" (White Front Rules and Regulations).

2. **A Review of Board Precedent Dealing With the Issue of Appropriate Units in the Retail and Discount Industry Demonstrates That Its Decision Herein Is Based Upon Factors That Are Contrary to the Purposes, Policies and Provisions of the Act.**

Prior to the appearance of retail and discount stores such as K-Mart, and its competitors such as White Front, the Board was confronted with appropriate unit questions in situations where two or more employers did business at the same location under lease or license agreements. Without exception, the Board held that the *only* standard upon which a joint-employer relationship could be predicated was a finding that the licensor or lessor maintained substantial control over the conditions of employment and labor relation policies relating to the employees of its licensees or lessees. See *e.g., Atlantic Mills Servicing Corp.,* 117 NLRB 65 (1957); *Fair Department Store,* 107 NLRB 1501 (1954); *Erlanger Dry Goods Co.,* 107 NLRB 23 (1953); *Alms & Doebke Co.,* 99 NLRB No. 132, 31 LRRM 1151 (1952); *Sperry & Hutchison Co.,* 117 NLRB 1762 (1957); *Duanes Miami Corporation,* 119 NLRB 1331 (1958); *The Darling Utah Corp.,* 85 NLRB 614 (1949); *Block & Kuhl Dept. Store,* 83 NLRB 418 (1949); *J. M. High Co.,* 78 NLRB 876 (1948). Thus, the Board did not consider that the facts that (1) licensees operated at the same location owned by the licensor, or (2) uniform methods of advertising and dealing with the public were established, or (3) the entire operation appeared to be an integrated operation, or (4) the licensor retained certain limited control for overall efficient operation of the complex, were legally sufficient to establish the various employers as joint

employers. (*Id.*) Where the requisite joint control over the conditions of employment and labor relations policies relating to the employees of licensees or lessees was absent, the Board refused to find that a joint-employer relationship existed. (*Id.*)

Nevertheless, with the appearance of retail and discount enterprises, such as K-Mart, Board law as it developed during the early 1960's, appeared to waiver from the long-standing policy that had been developed on the joint-employer issue in other contexts. Thus, the Board appeared to be placing greater emphasis on the *appearance* of a unified or integrated operation. Without explaining why or in what manner the appearance to the public of an integrated retail operation had any relevance to a joint-employer issue, the Board by way of *dictum* emphasized that factor, and appeared to minimize the factor of control by the licensors or lessors over the conditions of employment and labor relations relating to the employees of their licensees or lessees. See *Bargain City USA, Inc.*, 131 NLRB 803 (1961); *Frostco Super Save Stores, Inc.*, 138 NLRB 125 (1962); *United Stores of America,* 138 NLRB 383 (1962); *Spartan Department Stores,* 140 NLRB 608 (1963).[9]

However, beginning in 1964, in a series of well-reasoned and articulate decisions, the Board made it abundantly clear that the standard previously enunciated in numerous old joint-employer cases was equally

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[9]In each of these cases the licensor involved maintained substantial control over the conditions of employment and labor relations relating to the employees of their licensees. (See Footnote 7, *supra*) Therefore, the Board's emphasis upon the appearance of a unified or integrated operation in these decisions is clearly *dictum*.

applicable in cases involving retail and discount enterprises, such as K-Mart, namely, that there can be no joint-employer relationship *unless* there is a finding, supported by the record, that the licensor or lessor maintains substantial control over the conditions of employment and labor relations relating to the employees of its licensees or lessees. See, *e.g., S.A.G.E., Inc. of Houston,* 146 NLRB 325 (1964); *Bab-Rand Co.,* 147 NLRB 247 (1964); *Esgro Anaheim, Inc.,* 150 NLRB 401 (1964); *New Fashion Cleaners, Inc.,* 152 NLRB 284 (1965); *Triumph Sales, Inc.,* 154 NLRB 916 (1965); *Grand Central Liquors,* 155 NLRB 295 (1965).

That was the status of Board policy at the time of the Regional Director's decision herein. Nevertheless, the Regional Director herein refused to apply this fundamental Board policy, only to be followed inexplicably by the Board then ignoring the Regional Director's action by summarily denying Petitioners' requests for review. Thus, without discussion, the decision in the instant case marked still another reversal in Board policy. With this decision, it is patently clear that the Board has adopted a policy of finding a joint-employer relationship solely on the basis of "appearance", namely, the appearance of a unified or integrated operation, without regard to the factor of control over working conditions or labor relations.

Indeed, if there was any doubt in this regard, such doubt was laid to rest by the Board's decisions subsequent to the instant case, and most particularly *Thriftown, Inc.,* 161 NLRB No. 42, 63 LRRM 1298 (1966). There, the Board, overruling its Regional Di-

rector, found a joint-employer relationship even though there was not one whit of evidence establishing that the licensor exercised any control whatsoever over the conditions of employment and labor relations relating to the employees of its licensees; in fact, the contrary was conceded by all parties. The fact is that the *Thriftown* decision is more than a mere reversion by the Board to its initial decisions dealing with retail and discount complexes wherein *undue weight* was given to the fact that the licensor and its licensees operated under the same roof. Now, as *Thriftown* makes abundantly clear, a finding of a joint-employer relationship is *mandatory* under Board policy any time two or more employers are operating at the same location in such a manner as to give the appearance to the public of an integrated retail operation. This change in Board policy was the subject of a stinging dissent in the *Thriftown* decision:

> "In the case now before us, the operating agreement not only specifically states that 'nothing in this agreement shall in any way be construed to constitute a co-partnership or joint venture between the parties hereto'; it also specifically provides that Astra [the licensee], without the participation of Thriftown [the licensor], will hire, fire, and discipline its own employees, determine their wages, rate of pay, and other benefits, and establish its own deductions for taxes, social security, and related items. These provisions are clearly at odds with a contractual intent on the part of Thriftown and Astra to create a joint-employer relationship. Nor are there in this record other facts from which such an intent may reasonably

> be inferred. *We look in vain in our colleagues' opinion for evidence that Thriftown has actually controlled Astra's labor policies . . . The conformity requirements are quite clearly aimed at fostering the public appearance of a single integrated enterprise.* They have nothing to do with the employment relationship as such." [Emphasis added.]

The criticism of the Board's decision in *Thriftown* by its dissenting members may be accurately summarized by stating that Board policy is now based on irrelevancies rather than the appropriate economic or statutory considerations properly underlying unit determinations for collective bargaining. Frankly, there is but one explanation for the Board's startling and unprecedented decision in the instant case and in similar recent cases. The Board, quite simply, has abandoned all reason and logic and has substituted in its stead *as a controlling factor*—contrary to the dictates of Section 9(c)(5) of the Act—the extent of the union's organizational efforts. That conclusion can hardly be called an assumption for in the instant case, and in every case decided since this case, the Board's ultimate decision on the joint-employer question has been in accord with the unit sought by the union in its petition.[10]

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[10]In *K-Mart (San Fernando)*, 159 NLRB No. 28, 62 LRRM 1248 (1966); *K-Mart (Jackson)*, 161 NLRB No. 92, 63 LRRM 1385 (1966); *K-Mart (Commerce)*, 162 NLRB No. 41, 64 LRRM 1045 (1966); *Jewel Tea Co.*, 162 NLRB No. 44, 64 LRRM 1054 (1966); and *Thriftown, Inc.*, 161 NLRB No. 42, 63 LRRM 1298 (1966), the Board granted union requests for an overall joint-employer unit, summarily disregarding the employer requests for less than store-wide units. Most revealing is the Board's decision in *Bargain Town USA of Puerto Rico*, 162 NLRB No. 94, 64 LRRM 1160 (1967). There, the union petitioned for the employees of the lessor, and sought to exclude the employees of the lessees. In accordance with the union's unit request, the Re-

3. The Decision and Order Herein Will Operate to the Prejudice of the Licensees Doing Business in K-Mart's Commerce Store and Will Not Produce Sound, Stable Collective Bargaining Relationships.

Legal analysis aside, the most pernicious aspect of the Decision and Order of the Board herein is the prejudicial effect it will have upon the licensees doing business in K-Mart operations. An order requiring the licensees to bargain along with K-Mart collectively with the Union would have the effect of rewriting the license agreements the licensees bargained for and obtained from K-Mart, and equally important, it would have a like effect in changing the relationship of the licensees *inter se.*

Each of the Licensee Petitioners is an independent business organization of substantial size with its own separate and independent labor relations policies national in scope.[11] As independent business organizations, obviously none of these companies want to have their labor relations policies controlled by K-Mart. They did not bargain for, and do not want, the labor relations policies of K-Mart substituted for their own. Similarly, the licensees did not bargain for, and certainly do not want, K-Mart dictating the wages and fringe benefits they must pay to their employees, or the terms and

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gional Director held that the employees of lessees must be excluded on the ground that a joint-employer relationship did not exist. The Board, however, held that it was unnecessary to decide whether or not the lessor and its lessees were joint employers and excluded the employees of the lessees, in accordance with the union's desire.

[11]Thus, GallenKamp Stores Co. and Mercury Distributing Company are divisions of Shoe Corporation of America; F & G Merchandising, while principally based in Texas, is a subsidiary of the U.S. Rubber Company; and Acme Quality Paints, Inc. is a subsidiary of the Sherwin-Williams Company.

conditions upon which they hire, discharge or otherwise discipline their employees.

Furthermore, none of the licensees bargained for, and none of them want, joint liability with either K-Mart or other licensees doing business at K-Mart operations. For example, a licensee could be held responsible for unfair labor practices committed by its so-called fellow joint employers notwithstanding the fact that the licensee obviously could do nothing to control the conduct or prevent the unfair labor practice for which it would be held responsible.

Equally important is the salient fact that the Board's decision herein will not produce sound, stable collective bargaining relationships. To the contrary, the Board's decision will produce unstable, chaotic collective bargaining, thereby frustrating the fundamental purpose of the Act. That conclusion of necessity follows from the fact that the essential fact predicate underlying the Board's decision, namely, that K-Mart controls, or has the right to control, the wages, hours or working conditions and labor relations policies of its licensees is absent. In the absence of such control, the obstacles to sound, stable collective bargaining are many. Thus, while the Board presumably would have K-Mart dictate the terms upon which the licensees bargain, K-Mart, nevertheless, has no authority to do so. Therefore, unanswered are the questions of who, among the numerous employers herein, is to control the bargaining; who is to decide the numerous issues presented during bargaining; and, most significant, what happens when K-Mart or one or more of its licensees cannot or will not agree among themselves?

We submit that the only standard upon which a joint-employer relationship can be found, whether it be in the retail or discount store context, or any other context, is where the record evidence fully and amply supports a finding that the licensor exercises substantial control over the employment relationship between its licensees and its licensees' employees. Obviously, where the requisite joint control is absent, a finding—as was made in the instant case—that a joint-employer relationship exists would be ludicrous and, more importantly, prejudicial to all concerned.

B. An Overall Unit at K-Mart's Commerce Store Is Inappropriate Because, Among Other Reasons, F & G Employees Represent a Homogenous, Identifiable and Distinct Group and Lack a Sufficient Community of Interest With Other Employees to Warrant Their Inclusion.

The uncontradicted record evidence herein establishes that the duties of the employees of F & G are totally unrelated to and different from those of the garden-variety sales personnel found in other departments in the K-Mart's Commerce store. The evidence also reveals that the F & G employees are separately supervised, have different wages, hours and working conditions, work in a separate area and have separate facilities, and are treated independently of the other K-Mart and licensee operations. In short, the employees of F & G represent a homogenous, identifiable and distinct group which lacks a sufficient community of interest with the other employees herein to warrant their inclusion in the overall unit found appropriate by the Board. We submit that the Board's conclusion to the contrary is supported neither by fact or law.

The Board has consistently held that units consisting of employees of an automotive service department constitute an appropriate unit separate and apart from all other store employees. See, *e.g., Montgomery Ward and Company,* 150 NLRB 598 (1964); *J. C. Penney Co.,* 151 NLRB 53 (1965); *G. Fox & Co., Inc.,* 155 NLRB 1080 (1965); *Sears, Roebuck & Co.,* 160 NLRB No. 118, 63 LRRM 1141 (1966).

In *Montgomery Ward, Inc., supra,* the Board held that the employees of an automotive service department, including mechanics, gas island attendants, seat cover installers, stockmen and tire mounters constituted an appropriate unit separate and apart from all other store employees. In so holding, the Board noted that while a store-wide unit is presumptively appropriate, the service department employees exercise different skills, have separate supervision, work in a different area, and wear uniforms which set them apart from the other employees in the other departments of the store. Further, the Board noted that there was no interchange among such employees and other store employees.

All of those factors are equally true in the instant case; indeed, we submit that the facts herein present an *a fortiori* case for exclusion of the automotive service employees employed by F & G. Thus, unlike *Montgomery Ward,* wherein the automotive service department employees were employed by the same employer as the other store employees, and enjoyed the same wages, hours and working conditions, here, F & G's employees are employed by a separate and independent employer and enjoy different and separately determined wages, hours and working conditions.

In the *Montgomery Ward* case, the Board also distinguished a prior case involving the same employer, *Montgomery Ward and Company, Inc.,* 78 NLRB 1070 (1948), upon the ground that, unlike the earlier case, in the case before it there was a nucleus of craft employees—the mechanics. Additionally, the Board also noted that the record showed an absence of any close relationship between the work of the requested employees and the other groups of employees employed by the employer. *Montgomery Ward and Company,* 150 NLRB 598, 601 n. 11 (1964). Similarly, the record herein establishes that there is a nucleus of craft employees—the mechanics—and here also there is an absence of any close relationship between the work of F & G's employees and the employees employed by K-Mart and its other licensees. Equally significant is that in the instant case the wages, hours, and working conditions, and all other factors which the Board considers relevant, are separate and distinct as between F & G employees and the other employees in the K-Mart store.

The *Montgomery Ward* decision, 150 NLRB 598 (1964), has been reaffirmed in several recent Board decisions involving facts substantially identical to those presented in the instant case. See *J. C. Penney Company,* 151 NLRB 53 (1965); *Bamberger's Paramus,* 151 NLRB 748 (1965); *Esgro Anaheim, Inc.,* 150 NLRB 401 (1964); *Triumph Sales, Inc.,* 154 NLRB 916 (1965); *G. Fox & Co., Inc.,* 155 NLRB 1080 (1965); *Sears, Roebuck & Company,* 160 NLRB No. 118, 63 LRRM 1141 (1966).

For example, in *J. C. Penney Co., supra,* the Board specifically held that an automotive repair department annexed to a retail store was not appropriately a part

of an overall store-wide unit. There, the automotive department employees performed the same work that the various skilled employees in the instant case perform in F & G's operation. Citing as authority its recent *Montgomery Ward* case, the Board then stated:

> "[T]he automotive repair employees are a homogenous and identifiable grouping, departmental in character and sufficiently distinct from the other departments in the store to warrant their separate representation." *J. C. Penney Co., supra,* at 56.

The Board also relied upon its *Montgomery Ward* decision in *Bamberger's Paramus, supra,* in excluding auto service employees, who exercised different skills, performed different functions, worked in a different building, wore different uniforms and had limited interchange with the other store employees. Here, all those facts are present, and significantly, the uncontradicted record evidence establishes that there is *no* interchange between the F & G employees and the other employees of K-Mart and its licensees at the Commerce store. See also, *Esgro Anaheim, Inc.,* 150 NLRB 401 (1964); *Triumph Sales, Inc.,* 154 NLRB 916 (1965).

Since, in the language of the *Montgomery Ward* decision, F & G's automotive service center is "sufficiently identifiable, and distinct from the other departments," F & G was erroneously included in the unit herein. Accordingly, as an overall store unit is clearly not appropriate—and this is the unit in which the refusal to bargain is alleged to have occurred—none of the Petitioners herein can be found to have violated Section 8(a)(5) of the Act as alleged. *E.g., Deaton Truck Lines,* 143 NLRB 1372 (1963).

C. The Respondent Improperly Sustained the Union's Challenge to the Ballot of Employee Pentecost, Said Ballot Being Sufficient to Affect the Results of the Election Herein.

In brief, the facts with respect to the employment of employee Pentecost may be accurately summarized as follows: Pentecost was employed by F & G on February, 1, 1965 to work as a mechanic in the F & G department in K-Mart's Commerce store, the voting unit herein; he was first assigned to work at the F & G department in K-Mart's Costa Mesa store on a temporary basis for training purposes only; the wages paid to him while training at the Costa Mesa store were charged to the Commerce store; he physically reported at the Commerce store on February 19, 1965; and he worked at the Commerce store at all times thereafter to and including April 7, 1965, the date of the election.

On these facts, the Regional Director erroneously held that Pentecost was ineligible to vote in the election and sustained the Union's challenge to his ballot. We submit that the Regional Director's disenfranchisement of employee Pentecost was contrary to fact and law, and that this error, standing alone, requires that the Board's Order herein be set aside in its entirety.

The original Decision and Direction of Elections (Vol. III, G. C. Ex. 5(a)) designated February 24 as the cut off eligibility date. Pentecost was concededly both on the payroll and physically present performing his duties at the Commerce store since February 19—a full five days before the eligibility cut off date

—and for this reason alone Pentecost's vote should have been counted.[12]

Furthermore, despite the facts that (i) Pentecost was hired by F & G for employment in the Commerce store two and one-half weeks before February 17—the revised eligibility date established by the Regional Director's Supplemental Decision and Direction, (ii) his assignment to the Costa Mesa store was temporary and for training purposes only, and (iii) his salary while in training at Costa Mesa was charged to the Commerce store, the Regional Director nevertheless ruled that "Pentecost did not become an employee at Commerce until February 19, 1965." This decision is clearly contrary to numerous Board authorities, and particularly *Rohr Aircraft Corporation,* 104 NLRB 499 (1953), and *Johnson City Foundry and Machine Works, Inc.,* 75 NLRB 475 (1947).

In the *Rohr* case, the Board stated at page 502:

> "At the time of the hearing, 40 to 50 employees on the payroll of the Riverside plant were training at the Chula Vista plant for 'two or more weeks' for jobs at the former plant. Their training assignment, if not already completed, is in the nature of a temporary detail. We therefore find that these employees have a sufficient interest in the selection of a bargaining representative for Riverside plant employees to entitle them to vote in the election hereinafter directed."

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[12]Although the Regional Director's Supplemental Decision and Direction (Vol. III, G. C. Ex. 28(a)) states that the eligibility cut-off date was February 17, as noted earlier, this was in error in view of his original Decision and Direction of Elections (Vol. III, G. C. Ex. 5(a)).

In the *Johnson City* case the employee in question was an apprentice trainee who was required to spend 1000 hours in each of two job capacities outside of the voting unit before entering the unit. Despite the exceedingly long period of training outside the unit, the Board held at page 479:

> "It is apparent that this employee is primarily a foundry worker, and that his training assignment to a job outside the foundry proper, if that assignment is not already completed, is in the nature of a temporary detail. We shall permit him to vote in the election."

The facts with respect to Pentecost are, we submit, indistinguishable from those involved in the *Rohr* and *Johnson City* cases. Certainly, there can be no question whatsoever that Pentecost, just as the employees in the above two cases, had a sufficient interest in the selection of a bargaining representative for the Commerce store to entitle him to vote in the election held there. Indeed, in light of the Board's holdings in the *Rohr* and *Johnson City* cases, the facts herein present an *a fortiori* case for the conclusion that Pentecost was eligible to vote. Thus, in both these cases, by its reference to the training assignment if "not already completed," the Board specifically held that the employees in question were eligible even though they might still be training outside the voting unit on the date of the decision or, indeed, on the date of the election. Pentecost, on the other hand, was physically working in the voting unit before the date of the Decision and Direction of Elections and for over six weeks before the date of the election.

Despite these compelling authorities, the Regional Director sought to distinguish the *Rohr* case by holding that Pentecost was not "on the payroll" within the vague and mystical meaning attached by the Regional Director to that phrase. In so doing, emphasis was placed on the statement in Wall's affidavit that "I first put his name down on a store payroll of February 19." (G. C. Ex. 31, Ex. "A", p. 3). At the same time, however, the Regional Director wholly ignored earlier statements in the affidavit defining the "store payroll" as simply a record of hours worked each day by each employee in the store which, in turn, is submitted weekly to F & G's main office in Houston where the payroll is maintained and prepared and the checks are issued. Thus, Wall stated in his affidavit:

> "I keep a record of the hours worked by each employee daily. I transmit these records to Houston weekly on a Wednesday. Houston makes up the payroll, issues the checks and mails them back to me for distribution." (G. C. Ex. 31, Ex. "A", p. 2).

Since the "store payroll" is a record maintained by the store manager of the hours worked by employees at the store, obviously Pentecost's name could only have first appeared on the record maintained at Commerce on February 19, the first day that he physically worked at that location. Similarly, the hours worked by Pentecost at the Costa Mesa store could only have been recorded on the records maintained at that store since only the Costa Mesa manager, and not the Commerce

manager, could have known the hours worked by Pentecost at Costa Mesa. Thus, the record to which reference was made is nothing more than a document which confirms where Pentecost worked and when. As such, this record is no different than a card punched on a time clock—a device which, we assume, even the Regional Director would not regard as the "payroll".

In the *Rohr* case, the facts do not indicate, and certainly no one could logically assume, that the situation could have been any different. Surely, the hours worked by employees training at the employer's Chula Vista plant could only have been recorded, whether by management recording or by time clock, at Chula Vista where the work was in fact performed.

Finally, the facts herein are also analogous to those cases in which the Board has held that employees who are temporarily assigned to work outside of the voting unit are, nevertheless, eligible to vote. See, for example, *American Cyanamid and Chemical Corp.,* 11 NLRB 803 (1939) (employees temporarily transferred outside the voting unit to another plant of the employer held eligible to vote); *Great Lakes Steel Corp.,* 15 NLRB 510 (1939) (employee temporarily transferred out of the voting unit to another division of the employer held eligible to vote); *Quick Industries, Inc.,* 71 NLRB 949 (1946) (employee temporarily assigned outside the voting unit to work for a purchaser of the employer's product held eligible to vote); *Walton Lumber Co.,* 20 NLRB 573 (1940) (employees temporarily assigned to work for another employer held

eligible to vote in the voting unit); *E. J. Kelley Co.*, 99 NLRB 791 (1952) (employees temporarily assigned outside the voting unit to assist an independent contractor in construction work at the employer's premises held eligible to vote). See also *Armour & Co.*, 15 NLRB 268 (1939).

There can be no violation of Section 8(a)(5) of the Act in a case where the Board has improperly sustained challenges to ballots sufficient in number to affect the results of the election. *NLRB v. Joclin Mfg. Co.*, 314 F. 2d 627 (2nd Cir. 1963). For the foreging reasons, there was no violation of Section 8(a)(5) in this case.

VII.
CONCLUSION.

The record in the instant case is replete with errors, any one of which would warrant setting aside the Board's Order and Decision herein. All Petitioners herein at each juncture of the proceedings called these errors to the Board's attention, yet, from the very outset, the Board for reasons undisclosed on the record herein, determined not to confess error, and doggedly pursued the course chosen, compounding and recompounding its error, all to the prejudice of the Petitioners herein. It is axiomatic to state that the administrative process, no less than the judicial process, is a reasoned process. Yet, the instant proceeding before this Court cannot be rationalized. Only a petulant child at the controls of the machinery of the administrative processes of the Board could have produced the record that exists herein. It is within the ambit of the authority

of this Court and, indeed, this Court's paramount duty, to insure that such abuses of administrative processes do not go uncorrected.

It is submitted that for the reasons set forth in this Brief the Board's Order and Decision should be set aside and the complaint dismissed.

Respectfully submitted,

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Certificate.

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

CARL W. ROBERTSON.